Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-552

WHEELING PITTSBURGH STEEL CORPORATION,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF
ENVIRONMENTAL RESOURCES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

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In The

Supreme Court of the United States

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No.

WHEELING PITTSBURGH STEEL CORPORATION,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

Wheeling Pittsburgh Steel Corporation, petitioner herein, prays for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 375 A.2d 320 (1977) and is reproduced as Appendix A. The opinion of the Commonwealth Court of Pennsylvania is reported at 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975) and is reproduced as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on July 8, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED FOR REVIEW

Whether a ruling which deprives petitioner of any opportunity to be heard on its constitutional and other defenses to the validity and enforceability of the order and regulations which are the subject of this enforcement action against it violates petitioner's Fourteenth Amendment rights to due process of law?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 4 of the Pennsylvania Air Pollution Control Act provides in relevant part as follows:

> "All department orders shall be in writing, contain therein a statement of the reasons for their issuance, and be served either personally or by certified mail. Within thirty (30) days after service of any such order the person to whom the order is issued or any other person aggrieved by such order may file with the hearing board an appeal setting forth with particularity the grounds relied upon. An appeal to the hearing board of the department's order shall not act as a supersedeas: Provided, however, That upon application and for cause shown, The Hearing Board of the Commonwealth Court may issue such a supersedeas. Any person aggrieved by an adjudication of the hearing board may appeal to the Commonwealth Court."

35 Purdon's Pa. Stat. Ann. §4004(4.1)

STATEMENT OF THE CASE

In this action, filed in the Commonwealth Court of Pennsylvania, the respondent, Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter the "DER"), seeks to enforce its administrative order requiring petitioner Wheeling-Pittsburgh Steel Corporation to comply with certain regulations of the DER concerning sinter plant emissions. In its answer, petitioner challenged the validity and enforceability of the DER order and regulations on a number of grounds, several of which raised federal constitutional questions. Among others, petitioner alleged that the regulations exceed the state's police power because they are unnecessarily stringent for the protection of the public health, safety and welfare, are arbitrary and capricious, are incapable of rational enforcement and are void for vagueness.

The Commonwealth Court ruled that petitioner would not be permitted to introduce evidence relevant to these defenses in this proceeding (Appendix B), and that ruling has been affirmed by the Supreme Court of Pennsylvania (Appendix A). Petitioner seeks review of that ruling in this Court.

REASONS FOR GRANTING THE WRIT

The ruling in question deprives petitioner of any opportunity to be heard on its constitutional and other defenses to the validity and enforceability of the order and regulations which are the subject of this enforcement action against it. Petitioner respectfully submits that the ruling therefore violates its Fourteenth Amendment right to due process of law.

As pointed out in *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), early in our history this Court firmly established the principle that, at a minimum, due process requires a meaningful opportunity to be heard in one's defense. That principle has recurred again and again in the decisions of this Court for over a hundred years. See, e.g., *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914 (1876); *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215 (1897); *Goldberg v. Kelly*, 397 U.S. 254 (1970); and cases cited in *Boddie*, 401 U.S. at 377, n. 3.

There could, of course, hardly be a more fundamental defense on which a defendant should have the right to be heard than a challenge to the validity and enforceability of the order and regulations which are the very subject of the action against him. It is for this reason that the federal courts have consistently held that, except in the most unusual of circumstances, one can always challenge the validity and enforceability of an order or regulation in an enforcement action. *U.S. v. McCrillis*, 200 F.2d 884 (1st Cir. 1952); *Smith v. U.S.*, 199 F.2d 377 (1st Cir. 1952). See also: 3 Davis, *Administrative Law Treatise*, §23.07 at 320 (1958 ed.); and L. Jaffe, *Judicial Control of Administrative Action*, at 426 (1965 ed.). Yet the ruling of the courts below, if permitted to stand, would deny petitioner any opportunity to be heard on these fundamental defenses.

The courts below attempt to justify their ruling on the ground that petitioner should have raised these defenses in an appeal from the DER order which had granted it a variance from the regulations in question. That rationale is based upon a fundamental misconception of the statutory scheme of the Pennsylvania Air Pollution Control Act (hereinafter "the APCA"), the grant of variances thereunder and the nature of the DER order which granted petitioner its variance.

The APCA authorizes the adoption of regulations for the prevention, control, reduction and abatement of air pollution. 35 P.S. Purdon's Pa. Stat. Ann. §4005(1). Pursuant to that authority the regulations in question were promulgated and became effective on March 19, 1972. 2 *Pa. Bulletin* 383. However, because the regulations were technology-forcing in nature and were technologically impossible of compliance for certain industries at the time they were adopted, the APCA was amended to give the DER the power to grant variances therefrom. 35 Purdon's Pa. Stat. Ann. §4013.5. It was pursuant to this procedure that petitioner applied for and received the identical variance which it had requested from the DER.

The courts below assert that petitioner nonetheless should have appealed from the DER order which granted it that variance because the order imposed an obligation of compliance with the regulations by April 30, 1973. But having been granted the very relief which it had requested, petitioner was not aggrieved by that order and it therefore had no right to appeal therefrom at that time.[1]

Moreover, petitioner had no way of knowing at the time its variance was granted that the regulations would prove impossible of compliance after the variance had expired. Thereafter, petitioner immediately challenged the validity and enforceability of the regulations as soon as the DER

---

[1]In concluding that petitioner was aggrieved by the order which granted it the identical variance which it had requested, the courts below relied upon such Pennsylvania cases as *Com. v. Derry Twp.*, 466 Pa. 31, 351 A.2d 606 (1976); *Com. ex rel. Dunson v. Erie Ins. Exch.*, 465 Pa. 240, 348 A.2d 742 (1976); *Philadelphia v. Sam Bobman Department Stores Co.*, 189 Pa. Super. 72, 149 A.2d 518 (1959); and *Standard Lime and Refractories Co. v. DER*, 2 Pa. Cmwlth. 434, 279 A.2d 383 (1971). But in each of those cases, unlike the case at bar, the defendant had been directly, immediately and substantially aggrieved by the order in question. Here petitioner had received the very relief it had requested in the order.

attempted to enforce them against it. As the *Smith* and *McCrillis* cases point out, as a matter of constitutional due process a defendant in an enforcement action can always challenge the validity and enforceability of the administrative order or regulation in question unless there is a clear legislative intent to the contrary. And there is no such intent in the Pennsylvania Air Pollution Control Act under which even a person who has been aggrieved by an order of the DER *may*, but is not required to, appeal therefrom. 35 Purdon's Pa. Stat. Ann. §4004(4.1).

CONCLUSION

For these reasons, petitioner requests the Court to issue a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

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APPENDIX A

Supreme Court of Pennsylvania

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES
v.
WHEELING-PITTSBURGH STEEL CORPORATION,
Appellant

No. 64
March Term, 1976

ORDER

AND NOW, this 8th day of July, 1977, it is ordered as follows:

X Order Affirmed. Case remanded to Commonwealth Court for further proceedings.

___ Order Reversed.

___ Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.

___ Order Modified as set forth in opinion filed herewith.

___ Order as set forth in opinion filed herewith.

___ Costs to be taxed as provided by Chapter 27 of the Pa. R. A. P.

___ Costs to be taxed as provided in opinion filed herewith.

BY THE COURT

/s/ SALLY MRVOS
Prothonotary

NOTE: Unless another date is hereinafter set forth, the foregoing order was entered on the docket on the date set forth above. Order entered: _____.

Supreme Court of Pennsylvania

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	**No. 64 March Term, 1976**
v.	Appeal from an Order of the Commonwealth Court at No. 529 C.D. 1975
WHEELING-PITTSBURGH STEEL CORPORATION, *Appellant*	

OPINION OF THE COURT

Filed: July 8, 1977

O'BRIEN, *J.*

This appeal arises from the December 10, 1975, pretrial order of Commonwealth Court, which precluded appellant, Wheeling-Pittsburgh Steel Corporation (Wheeling), from introducing evidence relevant to the issues of the validity of an administrative order of the Pennsylvania Department of Environmental Resources (DER) and the regulations upon which the order was predicated. The order further denied Wheeling a jury trial.

The facts surrounding this appeal are as follows. On June 9, 1972, appellant requested from appellee a variance from DER's regulations. Title 25, Pennsylvania Code, §123.13 and §123.41. Section 123.13 deals with the "Particulate Matter Emissions" and §123.41 deals with "Visible Emissions." Appellant's request concerned its steel-making operation at its sinter plant in Monessen, Pennsylvania.

On September 25, 1972, pursuant to the variance request of Wheeling, DER issued Administrative Order No.

72-565-V, "Order Granting Temporary Variance." The order provided, *inter alia*:

> "1. The granting of such a variance will not prevent or interfere with attainment or maintenance of ambient air standards within the time prescribed by the Federal Clean Air Act and Rules and Regulations promulgated thereunder, inasmuch as the variance period requested extends only to April 30, 1973.
>
> "2. The emissions from the source are likely to comply with Section 123.13 inasmuch as, at the expiration of the variance period, said emissions are not likely to exceed 0.02 grains per dry standard cubic foot.
>
> "3. The granting of the variance, as requested, is reasonable inasmuch as the intermediate dates, and the completion dates set forth in the petition and incorporated into this order, indicate that the company intends to effect the control of the source as quickly as is reasonably practicable.
>
> "NOW, THEREFORE, this 25th day of September, 1972, the Department hereby grants a variance, as requested in the petition (a copy of said petition is attached hereto and marked Exhibit "A"), and further orders that the Wheeling-Pittsburgh Steel Corporation, its successors and assigns shall:
>
> "(a) on or before April 30, 1973, complete the implementation of the control plan set forth in the aforementioned petition for a variance, which plan is hereby incorporated herein and made a part hereof;
>
> "(b) on and after April 30, 1973, operate its sintering operation located at its plant at Monessen, Westmoreland County, Pennsylvania, in such a manner as to maintain the emissions of particulate matter to within the limits specified in Sections 123.1, 123.13 and

123.41 of Chapter 123 of the Rules and Regulations of the Department of Environmental Resources; and,

"(c) submit bimonthly progress reports to the Department of Environmental Resources, commencing on October 31, 1972 and continuing thereafter until compliance with paragraph (a) of this order is achieved.

"The foregoing variance is granted on condition that paragraphs (a), (b) and (c) of the foregoing order are complied with within the time specified for compliance.

"Compliance with the foregoing order shall be obtained in a manner that will not violate the Environmental Protection Statutes and Rules and Regulations promulgated thereunder.

"Nothing contained in this order shall be construed to prevent or limit the application of the provisions of Chapter 137 of the Rules and Regulations of the Department of Environmental Resources which relates to air pollution episodes.

"Any questions in connection with this action of the Department of Environmental Resources, as well as all progress reports, should be directed to Mr. James K. Hambright, Bureau of Air Quality and Noise Control, Department of Environmental Resources, Post Office Box 2351, Harrisburg, Pennsylvania 17105.

"Sincerely yours,

"HOWARD W. CHAPMAN
"Associate Deputy Secretary for
"Air, Water and Community Protection

"Attachments

"Notice of Appeal
"Rules of Practice and Procedure
"Air Pollution Control Act as Amended
"Rules & Regulations of the Department of Environmental Resources
"Exhibit "A" - Petition for Variance"

The above order granted Wheeling a variance from the enforcement of DER regulations concerning particulate and visible emission from its Monessen plant until April 30, 1973. Thereafter the Monessen plant would be required to comply with all DER regulations pertaining to particulate and visible emissions. Wheeling did not appeal the September 25, 1972 variance order to the Environmental Hearing Board.[1]

On April 15, 1975, DER filed a "Petition for Enforcement of Administrative Order" in the Commonwealth Court. The above petition sought compliance with the administrative order of September 25, 1972.

Wheeling filed an answer and new matter, which alleged that the DER regulations were invalid and unenforceable. Further, Wheeling sought a declaratory judgment concerning the validity of the regulations and also demanded a jury trial.

The Commonwealth Court, per President Judge Bowman, ordered the parties to brief the following issues:

"(a) May defendant in this proceedings attack DER Regulations 123.13 and 123.41 as invalid and unenforceable;

[1]See §6 of the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4006, and the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, 71 P.S. §510, et seq., which provide for an appeal to the Environmental Hearing Board from DER orders. The procedures for perfecting an appeal are set forth in Chapter 21 of DER's rules and regulations, 25 Pa. Code §21.1, et seq. and governed by the Administrative Agency Law, 71 P.S. §1710.1, et seq.

"(b) May defendant in this proceedings attack the DER order of September 25, 1972 (Order No. 72-565V) as invalid and unenforceable;

"(c) Is defendant, as a matter of law, entitled to a jury trial in this proceedings (i) by reason of the nature of the proceedings itself, or (ii) by reason of defendant invoking declaratory judgment relief in its answer to the petition for enforcement."

On December 10, 1975, Commonwealth Court denied Wheeling the right to introduce evidence concerning the issues of the *validity* of the September 25, 1972 variance, and of the regulations themselves; in addition, Commonwealth Court denied Wheeling a right to a jury trial.

On December 29, 1975, Wheeling filed an appeal to this Court from the December 10 order of Commonwealth Court. On December 30, 1975, Wheeling filed a petition with Commonwealth Court seeking a certification that the issues involved controlling questions of law and that a prompt determination of these issues would materially advance the disposition of the instant action. On January 7, 1976, the Commonwealth Court certified its order to this Court as involving controlling questions of law.

On January 28, 1976, DER filed a motion to quash the appeal. DER alleged that the December 10 order was not "final" and no appeal of right existed. DER further alleged that the issues involved were not "controlling" and, therefore, there was an improper certification by Commonwealth Court. DER also alleged that if the order was *not* a "final" order, Wheeling had not filed a petition for allowance of appeal with this Court. On February 4, 1976, Wheeling filed an answer to the motion to quash. On February 27, 1976, this Court directed that the motion to quash be heard at the time of argument.

I. MOTION TO QUASH

A. APPEALABILITY OF THE ORDER PRECLUDING ATTACK ON THE VALIDITY OF THE ADMINISTRATIVE ORDER AND DER REGULATIONS.

DER argues that the December 10 order of Commonwealth Court is not a *final* order of that court and, therefore, Wheeling does not have a right of direct appeal to this Court. We do not agree. Section 203 of the Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, No. 233, Art. II, §203, provides:

"... Appeals from the Commonwealth Court

"The Supreme Court shall have exclusive jurisdiction of appeals from all final orders of the Commonwealth Court entered in any matter which was originally commenced in said court and which does not constitute an appeal from another court, an administrative agency or a justice of the peace. Any final order of the Commonwealth Court entered in any appeal from a decision of the Board of Finance and Revenue shall be appealable to the Supreme Court, as of right, under this section."

The basis of this litigation is a petition to enforce an administrative order originally filed in Commonwealth Court. The gravamen of argument is whether the order of Commonwealth Court, limiting Wheeling's right to introduce evidence as to the validity of the variance order and the regulations, constitutes a final order for purposes of appellate review.

In *Posternack v. Am. Cas. Co. of Reading*, 421 Pa. 21, 23-24, 218 A.2d 350 (1966), this court determined that a pretrial order denying a party leave to amend an answer so as to assert a new affirmative defense constituted a "final"

order for purposes of appeal. In *Posternack*, this Court, per Mr. Justice (now Chief Justice) Eagen, stated:

> "... The order is not interlocutory, and the motion to quash will be overruled. The new defense proposed is affirmative in nature and must be pleaded, otherwise it is waived. See, Pa.R.C.P. 1030, 1032, and Lang v. Recht, 171 Pa. Superior Ct. 605, 91 A.2d 313 (1952). The order involved effectively precludes proof at trial of what might possibly be a complete defense to the cause sued upon. As to this defense, at least, the order appealed from puts the defendant 'out of court'. It is, therefore, an appealable order." See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) and Bell v. Benefic. Consumer Co., 465 Pa. 225, 348 A.2d 734 (1975).

In the instant case, the order of Commonwealth Court precluded Wheeling from presenting its "affirmative defenses" concerning the validity of the September 25, 1972 order or of DER air pollution regulations.

The refusal to allow evidence of a "possibly" meritous defense effectively puts Wheeling out of court and, therefore, the order is "final" for appeal purposes.

B. APPEALABILITY OF THE ORDER CONCERNING THE RIGHT TO TRIAL BY JURY.

DER next argues that the order denying Wheeling the right to trial by jury is not a final order. We agree. In *T.C.R. Realty, Inc. v. Cox*, Pa. , A.2d (filed April 28, 1977), this court defined a "final order" as follows:

> "... In ascertaining what is a 'final order,' we have looked beyond the technical effect of the adjudication to its practical ramifications. Bell v. Benefic. Consumer Discount Company, 465 Pa. 225, 348 A.2d 734 (1975). We have variously defined a final order as one which ends the litigation, or alternatively disposes of the entire case. Piltzer v. Independence F.S. & L. Assn., 456 Pa. 402, 319 A.2d 677 (1974); James Banda, Inc. v. Va. Manor Apts., Inc., 451 Pa. 408 303 A.2d 925 (1973). Conversely phrased, an order is interlocutory and not final unless it effectively puts the litigant 'out of court.' Ventura v. Skylark Motel, Inc., 431 Pa. 459, 463, 246 A.2d 353, 355 (1968)."

In the instant case, the denial of the right to trial by jury does not put the litigant "out of court," and therefore the order is not final for appeal purposes.

Wheeling, in rebuttal, argues that if the order concerning the right to trial by jury is not a "final order" then this court should accept the certification of Commonwealth Court that the issue presents a "controlling issue of law." We do not reach the merits of this argument because of Wheeling-Pittsburgh's failure to comply with §501(b) of the Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, No. 233, art. V, §501, 17 P.S. §211.501.

Section 501(b) provides:

> "(b) Discretionary Allowance of Appeals. - When a court or administrative agency, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such order. A petition for an allowance of an appeal under this subsection shall not stay the proceedings before the lower court or administrative agency, unless the lower court or agency or the appellate court or a judge thereof shall so order."

Wheeling did not file a petition for allowance of appeal in this Court after the certification by the Commonwealth Court. Pa. R. A. P. 1102, however, permits this Court to treat an "improvidently taken" appeal under Pa. R. A. P. 1101 as a petition for allowance of appeal. Treating the instant appeal, concerning the right to trial jury, as a petition for allowance of appeal, such petition is denied.[2]

II. MERITS OF THE APPEAL

Appellant argues that Commonwealth Court erred in prohibiting an attack on the validity of the September 25, 1972, order and DER regulations. We do not agree. On December 10, 1975, Commonwealth Court determined that "Wheeling . . . *shall not have the right to introduce evidence relevant to the issues of the validity of the order in question or the DER regulations upon which it was predicated.* . . ."

Wheeling did not appeal the administrative order of September 25, 1972. This order granted a variance to Wheeling until April 30, 1973, and further required

[2] "Rule 1101(a) Scope of rule. This rule applies to any appeal to the Supreme Court from an order of the Commonwealth Court entered in:

(1) Any matter which was originally commenced in the Commonwealth Court and which does not constitute an appeal from another court, an administrative agency or a district justice of the peace.

(2) Any appeal from a decision of the Board of Finance and Revenue."

"Rule 1102. Improvident Appeals. If an appeal is improvidently taken to the Supreme Court under Rule 1101 (appeals as of right from the Commonwealth Court) in a case where the proper mode of review is by petition for allowance of appeal under this chapter, this alone shall not be a ground for dismissal, but the papers whereon the appeal was taken shall be regarded and acted on as a petition for allowance of appeal and as if duly filed at the time the appeal was taken.

Note: Based on Section 204(b) of the Appellate Court Jurisdiction Act of 1970 (17 P.S.§211.204(b)) and makes no change in substance. In a similar fashion, any motion to quash the appeal would be regarded as a brief in opposition to the petition under Rule 1116 (brief in opposition to petition)."

compliance after April 30 with the particulate matter and visible emission regulation.[3]

In *Commonwealth v. Derry Tp.*, 466 Pa. 31, 351 A.2d 606, 610 (1976), this court, in considering a similar failure to use statutory appeal procedures precluding collateral attack on the validity of the questioned order and underlying regulations, noted:

> ". . . No appeal was taken by Derry to the Environmental Hearing Board. The failure to appeal made that order *final and foreclosed any attack on its content or validity in the enforcement proceeding.*" (Emphasis added.)

In *Com. ex rel. Dunson v. Erie Ins. Exch.*, 465 Pa. 240, 245, 348 A.2d 742 (1976), we stated:

> "Moreover, it is well settled that 'where statutory remedies are provided, the procedure prescribed by the statute must be strictly pursued, to the exclusion of other methods of redress [cites omitted]. This is particularly true of *special statutory appeals from the action of administrative bodies*. White et al. v. Old York Road Club et al., 318 Pa. 346, 178 A.3; Taylor v. Moore, 303 Pa. 469, 154 A. 799; Ermine v. Frankel et al., 322 Pa. 70, 185 A. 269.' [Emphasis supplied.] Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, 332 Pa. 15, 23-24, 1 A.2d 775, 780 (1938). Cf. Pennsylvania Life Insurance Company v. Pennsylvania National Life Insurance Company [417 Pa. 168, 208 A.2d 780 (1965)]. It follows that the Exchange, having failed to appeal from the Commission's adjudication and order of April 14, 1972, is now precluded from contesting the merits of the Commission's decision in subsequent enforcement proceedings."

[3] The record is clear that Wheeling was advised of its appeal rights but chose not to exercise those rights. See also Footnote 1, *supra*.

In the instant case, Wheeling was notified of its right to appeal the September 25, 1972 order. No appeal was taken; therefore, Wheeling is precluded from attacking the validity or content of either the order of the underlying regulations in the instant enforcement proceeding.

The order of the Commonwealth Court is affirmed, and the case remanded to that court for further proceedings. The motion to quash is granted in part and denied in part.

Former Chief Justice Jones took no part in the consideration or decision of this case.

Mr. Justice Nix took no part in the consideration or decision of this case.

Mr. Justice Pomeroy filed a concurring and dissenting opinion.

Supreme Court of Pennsylvania

WESTERN DISTRICT

COMMONWEALTH OF
PENNSYLVANIA, DEPART-
MENT OF ENVIRONMENTAL
RESOURCES

v.

WHEELING-PITTSBURGH
STEEL CORPORATION,
Appellant

No. 64
March Term, 1976

Appeal from an
Order of the
Commonwealth Court
at No. 529 C.D. 1975

CONCURRING AND DISSENTING OPINION

FILED: July 8, 1977

POMEROY, J.,

The order of the Commonwealth Court dated December 10, 1975 prohibits appellant Wheeling from introducing at trial evidence relative to the validity of the September 25, 1972 order of the DER and regulations in support thereof; it also denies Wheeling's request for a jury trial. Had the order been directed only to the latter point, certainly the correct disposition of an appeal therefrom would be to quash as interlocutory. As it is, however, it seems to me that the Court is being more technical than practical in isolating the jury trial portion of the order and quashing it. All agree that the principal part of the order of the Commonwealth Court, that which denies Wheeling the opportunity to present evidence

relevant to a complete defense, is a final order and hence properly before us. *See, e.g., Posternack v. American Casualty Co. of Reading*, 421 Pa. 21, 218 A.2d 350 (1966). Because of this I can see no jurisprudential purpose to be served by our delaying a decision on the jury trail question; we are still obliged now to entertain the appeal from that portion of the order below which is final, and a decision now on the jury issue might avoid a later appeal and a duplicative trial proceeding.*

By way of analogy, the same considerations of judicial economy and convenience which impel federal courts to entertain jurisdiction over a "pendent" state cause of action, of which a federal court would not otherwise have subject matter jurisdiction, suggest that the more prudent approach in the case at bar is for the Court to hear the appeal in its entirety. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 16 L.Ed.2d 218 (1966).

For the reasons above indicated, I dissent from the Court's partial grant of appellee's motion to quash. In all other respects, I join in the opinion of Mr. Justice O'BRIEN.

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*There may be cases where the issue involved in the "final" portion of an order appealed from is so lacking in substance as to be frivolous. Where this is so, I believe an appellate court should decline to exercise its discretion to decide the non-final issues, lest it lend encouragement to the use of the appealable aspect of the order as a mere vehicle for having interlocutory claims heard on appeal. Cf. *Abney v. United States*, U.S. , L.Ed.2d , 21 Cr.L. 3082 (decided June 9, 1977).

IN THE

Supreme Court of Pennsylvania

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Petitioner

v.

WHEELING-PITTSBURGH STEEL CORPORATION,
Respondent

NO. 529
C. D. 1975

Before: HONORABLE JAMES S. BOWMAN,
President Judge
HONORABLE JAMES C. CRUMLISH, JR.,
Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge

Submitted on Briefs

OPINION BY PRESIDENT JUDGE BOWMAN

Filed December 10, 1975

This matter is before us on a petition for enforcement of an administrative order brought by Department of Environmental Resources (DER).

In June 1972, respondent, Wheeling-Pittsburgh Steel Corporation, applied for a variance from minimum standards relating to particulate matter emissions into the

atmosphere as established by DER regulations, 25 Pa. Code §§123.13,123.41. The variance sought an extension until April 30, 1973, of the time for compliance with the standards set in the aforementioned regulations as applied to respondent's sintering plant in Monessen, Westmoreland County.

As a result of the variance request, DER issued an order on September 25, 1972, granting respondent a variance from the required standards until April 30, 1973. Respondent did not appeal this order.

On April 15, 1975, DER initiated enforcement proceedings in this Court pursuant to the Air Pollution Control Act, Act of January 8, 1960, P. L. (1959) 2119, *as amended*, 35 P. S. §4010, alleging that respondent had not complied with the order.

Respondent filed an answer containing new matter to the DER petition, which new matter raises several legal issues requiring resolution prior to evidentiary hearings on the merits of the petition. Those issues as framed by our Order of July 1, 1975, follow:

(a) May defendant (respondent herein) in this proceedings attack DER Regulations 123.13 and 123.41 as invalid and unenforceable;

(b) May defendant in this proceedings attack the DER order of September 25, 1972, as invalid and unenforceable;

(c) Is defendant, as a matter of law, entitled to a jury trial in this proceedings (i) by reason of the nature of the proceedings itself, or (ii) by reason of defendant invoking declaratory judgment relief in its answer to the petition for enforcement.

As to the issues of whether respondent can here attack DER Regulations 123.13 and 123.41 or its order of September 25, 1972, respondent has dealt with both issues in

a single argument, and DER has used similar rationale and authority in supporting its position on these two questions. In view of the parties' treatment of these two issues, we will dispose of them together.

Respondent has cited the case of *Department of Environmental Resources v. Pennsylvania Power Company*, 12 Pa. Commonwealth Ct. 212, 316 A.2d 96 (1974), *aff'd*, Pa. , 337 A.2d 823 (1975), which recognized impossibility of compliance as a defense in a contempt proceedings resulting from an unappealed DER order. At this point, however, we are concerned only with the validity of the order and regulations involved, not compliance. Other language in our opinion in that case is most appropriate, however, to the issue at hand:

> "A review of that procedure causes us to be very critical of the failure of PPC to contest the possibility of performance by way of an appeal from any of the DER orders.... The failure to take the administrative procedural protections available to a citizen from an order of a regulatory agency is not to be condoned." *Department of Environmental Resources v. Pennsylvania Power Company, supra*, 12, Pa. Commonwealth Ct. at 221, 316 A.2d at 101.

Respondent also stresses in its argument that it was not "aggrieved" by the order of September 25, 1972, because at that time it did not believe compliance would present any difficulty; therefore, respondent contends that no reason for an appeal was then indicated.

We disagree. As a result of the DER order of September 25, 1972, respondent was "aggrieved" within the meaning of the Act, 35 P. S. §4004(4.1). A party is "aggrieved" when there has been an "imposition upon a party of a burden or obligation". *Black's Law Dictionary* 87 (rev. 4th ed. 1968). Here, respondent had an obligation to comply with DER's

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regulations by April, 1973, and to do so, obviously placed a burden upon respondent, which arose as of September 25, 1972.

Respondent further argues that since the Act employs the words "may appeal", it is not mandatory to follow that procedure. We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise, would postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law. This principle was expressed in *Philadelphia v. Sam Bobman Department Store Company*, 189 Pa. Superior Ct. 72, 78, 149 A.2d 518, 521 (1959), in which Judge Woodside stated:

> "It is settled both under common law and statute that where an act creates a right or liability or imposes a duty and prescribes a particular remedy for its enforcement such remedy is exclusive and must be strictly pursued. This means that one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy.
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> . . . .
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> "... This is particularly true of special statutory appeals from the action of administrative bodies." (Citations omitted.)

Similarly, in *St. Joe Minerals Corporaiton v. Goddard*, 14 Pa. Commonwealth Ct. 624, 324 A.2d 800 (1974), in the context of the availability of equity jurisdiction to attack an administrative order, we found the right of appeal by the person against whom a DER order was issued constituted an adequate remedy at law, thus echoing the long standing judicial view that administrative resolution of technical

issues followed by Environmental Hearing Board review and judicial review thereafter is the preferred and proper procedure. Here, such preferred procedure would likewise be frustrated.

In *Standard Lime and Refractories Company v. Department of Environmental Resources*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971), a case involving the same appeal provisions as applicable here, we held that a party who had not timely appealed a compliance order could, nevertheless, seek a hearing on the issue of compliance, but could not at such hearing question the validity of the abatement order; again denying the right to collaterally attack an order from which no appeal had been taken.

Cases involving other administrative agencies of this Commonwealth have long espoused this policy. *Commonwealth v. Lentz*, 353 Pa. 98, 44 A.2d 291 (1945); *Milk Maid Dairy Products, Inc. v. Pennsylvania Milk Control Commission*, 190 Pa. Superior Ct. 410, 154 A.2d 274 (1959).[1]

We conclude that respondent in this proceedings has no right to attack the DER order in question nor the validity of the regulations upon which it was predicated.

The question of respondent's right to trial by jury in this enforcement proceedings necessarily emanates from Article I, Section 6, of the Pennsylvania Constitution, which provides:

> "Trial by jury shall be as heretofore, and the right thereof remain inviolate."

Our Supreme Court long has held that this language exists exclusively for the purpose of preserving jury trials as

[1] *Also see Erie Human Relations Commission v. Erie Insurance Exchange*, 12 Pa. Commonwealth Ct. 267, 315 A.2d 663 (1974), recently affirmed by the Supreme Court of Pennsylvania (No. 27 March Term, 1975, opinion filed November 26, 1975).

provided by common law.[2] *Van Swartow v. The Commonwealth*, 24 Pa. 131 (1854). It was not intended that the Constitution extend common law jury trial. *Schwab v. Miller*, 302 Pa. 507, 153 A. 731 (1931).

In an administrative matter, the dismissal of a teacher, the Supreme Court refused a demand for a jury trial based on the proposition that no right to jury trial existed prior to the Constitution, so none existed when the relevant statute did not so provide. *Watson Appeal*, 377 Pa. 495, 105 A.2d 576 (1954), *cert. denied*, 348 U.S. 879 (1954), *rehearing denied*, 348 U.S. 922 (1955). The Superior Court utilized similar reasoning in *Pennsylvania Public Utility Commission v. W. J. Dillner Transfer Company*, 191 Pa. Superior Ct. 136, 155 A.2d 429 (1959), involving a cease and desist order. Even where a civil penalty was involved, the court reasoned that since the matters entrusted to the Public Utility Commission were nonexistent at the adoption of the Constitution, no right to jury trial ever existed which the Constitution could preserve. Such is the situation in this present case.

In short, we hold, consistent with earlier Pennsylvania decisions, that the constitutional right to a jury trial does not extend to respondent in this proceedings, which are wholly a creature of recent statutory law.

Nor do we believe that respondent creates in its favor a right to a jury trial simply because it seeks declaratory relief in its answer to DER's petition for enforcement. To allow a respondent to alter the essential nature of the proceedings and thereby obtain a jury trial is illogical and would create an anomalous situation detrimental to the orderly operation of adminstrative law.

Furthermore, the Uniform Declaratory Judgments Act, Act of June 18, 1923, P. L. 840, *as amended*, 12 P. S. §836,

[2]Article IX, Section 6, of the Constitution of 1838 contained identical language.

forecloses its application in whole or in part to these proceedings. That statute provides:

> "Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy must be followed...."

The Act with which we are here concerned provides a clear specific form of remedy for those affected by DER orders or regulations. *See Friestad v. Travelers Indemnity Company*, 452 Pa. 417, 306 A.2d 295 (1973), and this Court's refusal to allow declaratory relief to be the vehicle for bypassing administrative procedures in *Gold v. Department of Public Instruction*, 16 Pa. Commonwealth Ct. 247, 328 A.2d 559 (1974). Respondent is not entitled to a trial by jury in this proceedings.

ORDER

Now, December 10, 1975, in further proceedings upon the Commonwealth's petition for enforcement of its order of September 25, 1972, respondent shall not have the right to introduce evidence relevant to the issues of the validity of the order in question or the DER regulations upon which it was predicated; and respondent is denied a jury trial in this proceedings.

/s/ JAMES S. BOWMAN
James S. Bowman, *President Judge*

CERTIFICATE OF SERVICE

I, PAUL A. MANION, in accordance with Rule 33(1) of the Rules of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari to the Supreme Court of Pennsylvania on all parties required to be served by mailing three copies thereto to Thomas M. Burke, Esquire, Assistant Attorney General, Department of Environmental Resources, 1200 Kossman Building, 100 Forbes Avenue, Pittsburgh, Pennsylvania 15222, Attorney for Respondent, by first class mail, postage prepaid, this 5th day of October, 1977.

/s/ PAUL A. MANION